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[redacted] Supreme Court

[redacted], 1997

[redacted],

Petitioner

v.

[redacted] WILSON

On Writ of Certiorari to the
[redacted] Court of Appeals
for the Ninth Circuit

BRIEF OF THE RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 90-1745

UNITED STATES, *Petitioner*

v.

RICHARD WILSON

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE RESPONDENT

STATEMENT

Respondent, Richard Wilson, who had no prior criminal record, was arrested and taken into custody on a state warrant on October 5, 1988 and charged with several robberies. On December 15, 1988, respondent was indicted in federal court for conspiracy to obtain money from the Bank of Putnam County, Tennessee by kidnapping its President. He was arrested on the federal charge on May 17, 1989, although he continued in state custody. Pet.App. 2a-3a.

On November 29, 1989, respondent plead guilty to the federal charge under an agreement that limited his incarceration to 96 months, with the government to take no position as to whether respondent would receive credit for the time he had spent in custody since October 5, 1988. J.App.C.A. 12. The district court accepted the guilty plea. At the sentencing hearing on November 29, 1989, the court determined that the base offense level was 18 and with upward adjustments for possession of a firearm during the offense, for the victim being a bank, and for respondent's role as a leader or organizer of the offense for an adjusted offense level of 26. The court then reduced this level by 2, finding respondent to have accepted responsibility. J.App.C.A. 40-41. For an offense level of 24, a person with no prior criminal history (Category I) the sentencing range was determined to be 51 to 63 months. The court found that respondent's planned use of high school students as coerced participants in his criminal scheme and the inadequacy of his criminal history category were aggravating circumstances not adequately considered by the Sentencing Commission, and departed above the guideline range to a sentence of 96 months.

Respondent argued that the district court should credit his time in custody since his arrest in October 1988, under the provisions of 18 U.S.C. § 3585 since he had not received credit for that time against any other sentence. J.App.C.A. 69-71. The government's position at the sentencing hearing was that an upward departure was warranted and that it would take no position on the question of respondent's request for jail credit stating that it was up to the court. J.App.C.A. 72. The court declined to grant jail credit for the time respondent was in custody from his arrest until imposition of sentence. J.App.C.A. 73. Respondent then filed a timely Notice of Appeal to the United States Court of Appeals for the Sixth Circuit.

Meanwhile, on December 5, 1989, respondent plead guilty in state court in Tennessee for three felony offenses. On December 12, he received sentences aggregating 15 years, to be served at 30% and to run concurrent

with the federal sentence. On the same date he was transferred to federal custody where he has remained ever since. The state court judgment ordered that respondent receive credit for 429 days of jail credit. Gov't C.A.Br. Addenda A-C.

The Court of Appeals affirmed the upward departure, but reversed as to the denial of jail credit, finding, as to 18 U.S.C. § 3585, "[t]he language of the new statute is both broad and mandatory, rather than narrow and permissive, stating that a defendant '*shall* be given credit' for '*any* time he has spent in official detention . . . as a result of *any* other charges'" (emphasis original). Pet. App. 5a-6a. The Court of Appeals remanded the case to the district court for resentencing with a grant of any jail credit which had not been credited against another sentence at the time federal sentence was imposed. Pet. App. 8a. Following the denial of the government's petition for rehearing, the district court resentenced respondent, awarding him credit against his sentence for 429 days of pre-sentence detention. Brief of the United States App. 1a-2a.

Respondent has been in custody continuously since his arrest on October 5, 1988. Since December 12, 1989, he has been in federal custody. On October 25, 1991, the Tennessee Board of Paroles recommended respondent's release on parole to his federal sentence. Appendix A *infra*. Thus, although his time in custody prior to imposition of sentence has been credited against both federal and state sentences, his state incarceration has been ordered to run concurrently with the federal sentence. In fact, his state incarceration has already concluded with his release on parole before his release from federal incarceration. Even without parole release, and without jail credit, respondent would serve his state sentence in 4 and ½ years (15 years at 30%). Respondent will have fully served his state sentence well before he is released from federal custody. Given federal good time that approximates 15% of the sentence, he will serve roughly 6 and ¾ years. Thus, although he would have technically received credit against

his state sentence, if the Government's position is adopted, respondent's actual time in custody will have exceeded the sentence that Congress intended for him to serve by 429 days.

SUMMARY OF ARGUMENT

When Congress rewrote the statute that was to become 18 U.S.C. § 3585, it did so as part of the most comprehensive revision of federal criminal law this century. The Sentencing Reform Act of 1984 completely restructured the sentencing process in federal courts. The discretion of sentencing judges was severely restricted; parole was abolished and good time credits were reduced and made more predictable. The goals of Congress were to reduce unwarranted disparity and to increase certainty and fairness in the imposition of federal criminal sentences. A small, but consistent part of this reform was the revision of the law on jail credits that mandated the award of credit for all post offense, pre-sentence detention time, except that which had already been credited elsewhere. The Court of Appeals correctly held that an integral part of that change was to replace the Attorney General in the decision making process with the sentencing court.

The Government argues that Congress could not have intended to make such a change without saying so explicitly since the Attorney General had developed expertise in this area in over 25 years. This argument is fundamentally flawed because it fails to consider that the statute is part of the Sentencing Reform Act which wrought a major change in federal sentencing. Section 3585 was intended to allow, and in fact to require, the sentencing judge to determine at the time of sentencing the precise sentence which the convicted defendant would actually serve, subject only to the award of good time credits that could reduce the time in custody in a precise and predictable manner. With the implementation of the Sentencing Reform Act, no longer would the sentencing judge impose a sentence of incarceration that would only

be a maximum sentence, with the actual time in custody determined much later by the Parole Commission or the Bureau of Prisons, subject to revision by either or both at any time prior to release. Congress decided that disparate sentences of uncertain and changing duration were counterproductive to the proper interests of sentenced inmates and society.

The Sentencing Guidelines mandated by Congress in the Sentencing Reform Act would reduce substantially unwarranted disparity by limiting the range of sentences available for a particular offense committed by an offender with particular characteristics. Once the length of sentence was determined, the abolition of parole would reduce the uncertainty of how much time would actually be served before release. Reducing good time credits and providing that once awarded, or denied, they could not later be restored, or taken away, added to the certainty, at the time of imposition, of a federal sentence. This "truth in sentencing" was enhanced by mandating the award of credit for prior jail time served and removing the power from prison administrators to award or deny it.

For the district court to determine and award jail credit is not only consistent with the rest of the Sentencing Reform Act, but is logical and practical. Given the clear mandate of the statute, the only issues to be resolved are whether the questioned time was in "official detention" and whether it has already been "credited" elsewhere. These are justiciable questions of fact and law or mixed fact/law questions that district courts are particularly suited to answer and, as the Government admits, must ultimately be resolved by the courts. Working together the court, through its probation officer, the sentenced defendant, through his attorney, and the government, through the U.S. Attorney, will be able to insure that the facts necessary to a proper determination are fully and fairly presented. In most situations, the witnesses and documents necessary for the determination

will be more accessible to the sentencing court than to a Bureau of Prisons counsellor at a distant prison. The decision, once made, will be subject to appellate review at the same time the conviction and/or sentencing is reviewed, so that at the time of imposition of sentence, or no later than at the time of the conclusion of any appeal, all concerned will know precisely how much time the defendant will actually serve, subject only, as Congress intended, to the limited award of good time credit.

This sentencing scheme designed by Congress can, of course, result in what might be construed to be double credit for time in custody, but only where a state court sentencing the defendant after federal sentencing, decides, as it has the right to do under the statute, that the defendant should receive the credit for his state, as well as federal sentences. Further, the Sentencing Reform Act included limited opportunities for post sentence correction of sentence that will allow for appropriate corrections in the rare occasions where the intent of both federal and state sentencing courts is subverted by unique circumstances.

ARGUMENT

I. WHEN CONGRESS MOVED THE AUTHORITY FOR AWARDING JAIL CREDIT FROM THE ATTORNEY GENERAL TO THE DISTRICT COURT, IT DID SO AS A LOGICAL AND PURPOSEFUL PART OF THE SENTENCING REFORM ACT OF 1984.

A. Congress Enacted 18 U.S.C. § 3585 As Part of the Sentencing Reform Act of 1984.

The fatal flaw in the Government's analysis of Congressional intent in the enactment of what became 18 U.S.C. § 3585 is the failure to consider that statute in context with the passage in 1984 of the Sentencing Reform Act of which it is an integral part. The dates when 18 U.S.C. § 3585 was enacted, 1984, and when it became effective, 1987, are not dates without other significance. They are the dates of enactment of the Sentencing Reform Act and its effective date. Viewed in context with the other provisions of that Act, it is clear that Congress did, in fact, intend to shift responsibility for the determination of jail credit for convicted defendants from the Attorney General to the sentencing court.

After many years of study, Congress included in the Comprehensive Crime Control Act of 1984, Public Law 98-473, Title II, the Sentencing Reform Act. This Act wrought sweeping changes in a sentencing system unchanged in substantial part for nearly a century. *Mistretta v. United States*, 488 U.S. 361 (1989). Congress found that the existing federal sentencing process, based loosely on a rehabilitative model, had failed. *See* Senate Report No. 98-225, 98th Cong., 1st Sess. 40 (1983), *reprinted at* 1984 U.S. Code Congressional & Administrative News, 3182, 3223 (hereafter "Senate Report"). It was characterized by substantial, unwarranted disparity in sentences imposed upon similarly situated defendants. Senate Report at 41-46. The confusion in sentencing responsibility between the sentencing court and the Parole

Commisssion resulted in uncertainty as to the duration of any sentence of incarceration, so that "prisoners often do not really know how long they will spend in prison until the very day they are released." *Id.* at 49. To address this situation, Congress crafted a comprehensive sentencing scheme that included a statement of the purposes of sentencing, use of sentencing guidelines, abolition of parole, and more certainty in the computation of good time credits. Congress intended this system to promote comprehensiveness and consistency, fairness in sentencing, certainty in release date of sentenced offenders, increased availability of sentencing options, and consistency of purpose. *Id.* at 50-60. This would be accomplished by a sentencing process in which the Court would determine a sentence using objective criteria, "whereby the offender, the victim, and society all know the prison release date at the time of the initial sentencing by the court, subject to minor adjustments based on prison behavior called 'good time.'" *Id.* at 46.

Viewed in this light, it would certainly be sensible, and probably even essential, for Congress to have shifted the determination of credit a sentenced defendant is entitled to for pre-sentencing time in detention to the time of imposition of sentence and to have provided definite guidance as to under what circumstances credit would be awarded. Thus, when it wrote the section that became 18 U.S.C. § 3585, it was entirely logical for Congress to have given that role to the sentencing court, especially since it made the award of credit for all pre-sentencing time in detention mandatory, except where it had already been credited elsewhere. To have left this determination to the Attorney General and the personnel of the Bureau of Prisons, subject to revision throughout a defendant's time in custody, would have been contrary to the desired goals of giving the sentencing responsibility to the district judge and of assuring certainty in release date.

There is another, very practical reason why the determination of the credit for prior time served should be made by the sentencing judge: Congress gave the district courts the job of setting the proper sentence under the guidelines and the allowance or denial of credits will play an important role in the judge's decision. To illustrate, the court is required to use the guidelines by determining the defendant's prior criminal history and the nature of the offense for which he was convicted, to locate the proper range of sentence. 18 U.S.C. § 3553; United States Sentencing Guidelines § 1B1.1. The court then has to consider whether there are any legitimate reasons (aggravating or mitigating circumstances not adequately considered by the Sentencing Commission) that would justify a departure above or below the guideline range and, if so, whether to depart. Obviously, that determination would inevitably be informed by the availability of prior jail time credits, one way or the other, and yet, according to the Government, the sentencing judge cannot make that determination but must leave it to the subsequent decisions of the Bureau of Prisons.

Moreover, while decisions to go outside the guidelines are relatively infrequent, the judge in every case must decide where, within the applicable guideline range each defendant should be sentenced. Since the range of sentences for a given guideline are no less than six months, the availability of mandatory credits for time previously served cannot help but influence the judge in selecting the proper sentence. Nonetheless, under the Government's theory, the district judge here would not know whether the 429 days that respondent served would or would not be credited to him when he decided whether the sentence imposed should be 51 or 63 months, or if a departure is imposed, as here, how much is necessary to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing. 18 U.S.C. § 3553(a). Given Congress's clear goals of ending uncer-

tainty and disparity, and since Congress gave control over the length of the sentence to the judge not the Attorney General, assigning the role of carrying out section 3585 to the Attorney General simply makes no sense.

B. Removal of Authority from the Attorney General for the Determination of Jail Credit for Sentenced Defendants Is Consistent with Other Provisions of the Sentencing Reform Act.

As Congress prepared to initiate a new system for sentencing convicted offenders, it was troubled by the lack of certainty in the release date of incarcerated offenders. It found the cause of this to be largely the result of the shared responsibility among the sentencing court, the Bureau of Prisons, and the Parole Commission. Under the former system, the sentencing court would set what was effectively the maximum term of incarceration, the Parole Commission would set the effective release (on parole) date, while the actual release date could alternatively be determined by the award of good time and other incentive credits which could reduce the expiration of the term below the parole release date. Changes in the parole release date and the withdrawal and/or restoration of good time credits caused the actual release date to be constantly subject to change. Senate Report at 46-49; *Mistretta*, at 488 U.S. ——, 109 S.Ct. 651. This system promoted disparity and uncertainty. The disparity often was the result of sentencing judges trying to anticipate what release date would be set by the Parole Commission and setting a sentence that would permit that date in some cases and setting a date arbitrarily high or low for the purpose of subverting the anticipated parole date in other cases. Uncertainty was inevitable under a system where the release date was subject to revision at any time up until the date of release.

Believing that disparity and uncertainty were counterproductive of any legitimate goals of a sentencing process,

Congress rejected the arguments of the Parole Commission and others to maintain the Commission in some fashion. Senate Report at 53-56, 57-59. Instead, it consolidated sentencing authority in the sentencing judge so that all parties will know, as of the date of imposition of sentence, when an incarcerated defendant will be released, subject only to predictable, limited adjustments for good behavior in prison.

Clearly, if made at the time of sentencing, the determination of how much credit to award a sentenced defendant for time in custody prior to imposition of sentence will not have any impact on the issue of certainty in sentencing, unlike the parole determination under the prior system. However, as in this case, this determination can have significant impact on the release date and, therefore, consistent with its goals to reduce uncertainty and disparity, that determination had to be made at the time of sentencing by the sentencing judge. Many of the concerns that led Congress to reject a continued role for the Parole Commission similarly dictate vesting the determination of jail credit in the sentencing court instead of the Attorney General.

First, the Government argues that allowing the Attorney General, through the Bureau of Prisons, to determine jail credit will result in a more uniform application of the statute than if it is applied by the District Courts. However, Congress rejected precisely this argument when made on behalf of the Parole Commission:

> Initial decisions of the Parole Commission are made by at least 35 hearing examiners, not by the nine Commissioners. It seems unlikely that more than 40 people making administrative decisions would result in substantially less inconsistency than a few hundred people making judicial decisions after hearing arguments presented by counsel for both sides, which are subject to appellate review by eleven counts of ap-

peals sitting in panels and, ultimately, by a single Supreme Court.

—Senate Report at 54-55.

Congress also found no reason to believe that the Commission would be reliably accurate in applying guidelines, in light of studies that showed that parole examiners made errors in more than 50% of test cases, and that most of these errors were not corrected on appeal. Surely, Congress expected no more reliability in allowing hundreds of prison clerks and counsellors to determine entitlement to jail credit.

Congress also expressed a reluctance to continue a process where the resolution of factors impacting on the length of incarceration is "determined in private rather than public proceedings," Senate Report at 55. Instead, it expressed a preference for a system that "keeps the sentencing power in the judiciary where it belongs, yet permits later review of sentences in particularly compelling situations." Senate Report at 121. Thus, Congress was given the choice between determination of jail credit at some unspecified later date by one of many clerks or counsellors, subject to revision at any time, or determination in a public forum by the sentencing judge at the time of sentence imposition, subject only to review by an appellate court. Its exercise of this choice was clear and logical, particulary in light of the other policy choices made in the Sentencing Reform Act.

It is true that Congress did not expressly authorize the court to make the jail credit decision of 18 U.S.C. § 3585. Brief of the United States p. 18; *see United States v. Beston*, 936 F.2d 361, 363 (8th Cir. 1991; *United States v. Chalker*, 915 F.2d 1254, 1258 (9th Cir. 1990); *United States v. Brumbaugh*, 909 F.2d 289, 291 (7th Cir. 1990) and *United States v. Lucas*, 898 F.2d 1554, 1555 (11th Cir. 1990). But it did not expressly authorize the Attorney General either; that is why this

Court has to decide this issue. However, given the overall design of the sentencing process under the Sentencing Reform Act, it would be illogical for jail credit to be granted at any other time than the imposition of sentence and by anyone else other than the sentencing judge. The logic of respondent's position is confirmed by other aspects of the Sentencing Reform Act. In addition to abolishing parole, Congress provided that any post incarceration supervision would be determined, both as to term and conditions, at the time of sentencing. *See* 18 U.S.C. § 3583 (Inclusion of a term of supervised release after imprisonment.) It also provided guidance for the district court's determination as to whether multiple terms of imprisonment would be concurrent or conservative, 18 U.S.C. § 3584. In other words a sentence imposed by a judge that includes imprisonment "will represent the actual period of time that the defendant will spend in prison" except only for good time allowances. Senate Report at 115. Putting the decision on granting jail credit in the hands of the court at the time of sentencing adds to the certainty of term of imprisonment Congress wanted to find in the act of imposition of sentence. *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206 (1984) (Court's duty is to "find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested.")

C. Congress Expressed Its Intent to Remove Jail Credit Authority from the Attorney General.

Prior to 1984, the law governing jail credit expressly designated the Attorney General as the party responsible for granting credit: "[t]he Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed." 18 U.S.C. § 3568. Concurrent with the repeal of section

3568, section 3585 was enacted without mentioning the Attorney General. Where an earlier version of legislation included a provision subsequently deleted, it can be presumed that Congress intended to delete the provision. *Russello v. United States*, 464 U.S. 16, 24 (1983). While a change in language is not an infallible guide to the intent of the legislature, *McElroy v. United States*, 455 U.S. 642, 651 n.14 (1982), here there is no conflict between the language of the statute, in excluding the reference to the Attorney General, and the legislative history of the Sentencing Reform Act with its expressed intent to place sentencing authority in the district court and its emphatic desire for certainty in release date of an incarcerated defendant at the time is imposed. *Aaron v. Securities and Exchange Commission*, 446 U.S. 680, 701 (1980) ("In the absence of a conflict between reasonably plain meaning and legislative history, the words of the statute must prevail.")

The Government argues that Congress could not have intended to remove the Attorney General from the decision-making process without doing so expressly. Brief of the United States, pages 18-19. It is true that neither the new statute, nor the legislative history dealing specifically with section 3585, mention the Attorney General or the deletion of his role in the process. Therefore, this Court should look to the language Congress used and to the legislative purpose of the Act. *United States v. Bornstein*, 423 U.S. 303, 311 (1976) ("But the absence of specific legislative history in no way modifies the conventional judicial duty to give faithful meaning to the language Congress adopted in the light of the evident legislative purpose in enacting the law in question"). Here, Congress expressed its intent by deleting reference to the Attorney General. Clearly, if Congress had intended for the determination of jail credit to continue as before, it would have done so by designating the Director of the Bureau of Prisons with such responsibility. That it chose not to do so is a recognition of the fact that the

determination of jail credit is now a part of the sentencing process, a judicial function, best decided by courts rather than an administrative function to be decided by prison staff.

Under the prior indeterminate sentencing system in which the Parole Commission determined the parole release date, it made sense for the Attorney General, who determined the mandatory release date (sentence imposed minus crdit for good time, industrial time, etc.) to also calculate jail credit. However, when Congress abandoned indeterminate sentencing with passage of the Sentencing Reform Act, it made sense to place the resolution of all factors that would influence the release date of an incarcerated defendant in the hands of the sentencing judge. Only good time credits, that cannot be determined except after the defendant has been in prison are not subject to determination at the time of imposition of sentence.

The Government makes much of the use of "was imposed" rather than "is imposed" in the wording of section 3585. Brief of the United States pp. 12-13. The Government interprets the use of the past tense to indicate that the jail credit decision is to be made at some unspecified date after sentencing. However, the use of the past tense could just as easily be interpreted to mean that Congress anticipated that the court would first determine the length of a prison sentence under the guidelines, impose that sentence, decide whether it would be concurrent or consecutive to any unserved sentence, and then reduce it by any credit for prior time in detention. This latter construction is more consistent with Congress's clearly expressed preference for certain and precise terms of imprisonment at the time of imposition of sentence. The Government's only explanation for the deletion of the Attorney General from the statute is that it is the result of "Congress's rather inelegant craftsmanship." Brief of the United States p. 18. Yet, it argues that the Court should assume that the same "in-

elegant" drafters used the past tense precisely to replace its deletion of the Attorney General. The Government cannot, we submit, have it both ways.

The Government also suggests that, since Congress used such language as "the court shall" or "the court may" in other sentencing statutes and did not refer to the court in section 3585, Congress did not intend to vest the power in the court. Brief of the United States p. 19. But the converse is also true: Congress specifically referred to the Attorney General or the Bureau of Prisons in other places and did not do so here.[1] But if the focus is on the overall intent of the statute, as it fits into the new sentencing scheme, the answer is clear. A person sentenced under the Sentencing Reform Act should leave the courtroom knowing when he will be released from prison, subject only to his behavior while incarcerated. For the sentencing judge to grant, or deny, jail credit at that time accomplishes the purposes of sentencing reform. To defer the grant, or denial, of jail credit until some later date, subject always to reassesment by a prison official, defeats, at least in part, the purposes of sentencing reform. Congress should not be seen to have intended such a result.

The Government asserts that Congress would not have intended to work such a change in light of the long history and orderly fashion in which the Attorney General had dispatched jail credit duties since 1966. Yet a similar argument was made in an effort to save the Parole Commission. It too had been involved for years in the sentencing process, determining the release date for most prisoners. In more recent years, it too had developed a set of guidelines to make its actions more uniform and consistent. *Mistretta* at 109 S.Ct. 651. It too had a trained cadre of administrators applying its guidelines.

[1] Congress vested the Director of the Bureau of Prisons with authority for post sentence administration of incarcerated defendants in 18 U.S.C. §§ 3621-24.

Yet Congress found that the role of the Parole Commission in the sentencing process contributed to the disparity and uncertainty that debilitated the federal criminal justice system and removed it from the process. The very flexibility of determination and re-determination that the Government touts as the strength of the Attorney General's role is one of the examples of delay and uncertainty in release date that Congress wanted to avoid. The fact that Congress spent more time and was more careful to eliminate the role of the Parole Commission than it did to eliminate the role of the Attorney General in determination of jail credit is indicative, perhaps, of the lesser impact jail credit has on release date than parole. It may also be a reflection of the fact that the Parole Commission was to be disbanded, whereas the Attorney General and Bureau of Prisons were only to be relieved of a duty performed for only 25 of this nation's 200 years. But Congress's failure to speak of removing the Attorney General should not be read to mean that it intended to continue a system that would contribute to the disparity and uncertainty of sentencing in the same manner, but in a lesser degree, as the Parole Commission.[2]

[2] Respondent agrees with the Government that Congress did not intend to create a system of shared responsibility between the district court and the Attorney General. For the same reasons that Congress rejected proposals to continue the Parole Commission under a hybrid system of shared sentencing responsibility, it is highly unlikely that Congress would shift responsibility to the district court for purposes of certainty of release date and then leave the Attorney General empowered to "second guess" the district court or modify its determination at a later date on changed circumstances.

II. DETERMINING ENTITLEMENT TO JAIL CREDIT AT THE TIME OF SENTENCING IS A MORE FAIR AND ORDERLY PROCESS THAN LEAVING THE QUESTION FOR DETERMINATION BY THE ATTORNEY GENERAL AT SOME UNSPECIFIED LATER DATE.

A. Determining Jail Credit at the Time of Imposition of Sentence Allows for Full and Fair Development of Any Factual and Legal Issues in a Timely Manner and in a Convenient Forum Equipped to Resolve Such Issues.

In the vast majority of cases, the grant of credit to a sentenced offender for previous time in custody will be a simple mathematical calculation of counting the days from beginning of detention until the offender is received at a correctional institution. In those cases where there is a conflict as to entitlement to credit, it will likely be over one of two readily justiciable issues: whether the questioned time was in "official detention" or whether the time has already been "credited" to another sentence. Each would involve questions of fact and/or law of the type that can and should be resolved by the sentencing judge. For instance, there could be a claim for credit for time spent on pre-trial release under restrictive conditions. The district court, after taking any evidence offered by the parties, would make factual findings and apply the law. *See, e.g., United States v. Beston*, 936 F.2d 361 (8th Cir. 1991); *United States v. Chalker*, 915 F.2d 1254 (9th Cir. 1990); *United States v. Woods*, 888 F.2d 653 (10th Cir. 1989). Or the district court might be asked to decide whether credit against concurrent state sentence, that was consumed by the federal sentence had been "credited against another sentence" within the meaning of the statute.[3]

[3] The Government also asserts, Brief of the United States 13-14, that since credit is to be awarded up to the date of receipt at a prison, which will occur after sentencing, the district court cannot make an award, not nowing when the offender will reach the institution. However, there is no reason that a judgment and commitment order can not grant credit for the number of days in detention prior to sentencing (say 100) and order that the offender will also receive credit for the days between imposition of sentence and arrival at the prison. The prison administrator would then need only to add these two figures to the time in custody at the institution and subtract the good time entitlement to determine the release date.

In making such decisions, relevant witnesses and documents will generally be within the geographical confines of the district. More importantly to a fair determination of contested facts, parties with an interest in the outcome will have equal access to subpoena power and the use of lawyers to develop and present proof and arguments in support of a position. The decision will be made in open court, on the record, at the time of sentencing, so that all concerned will know, at the time of sentencing, what impact the grant or denial of jail credit will have on the service of the sentence.

On the other hand, if the Government's position were adopted, contested issues regarding the grant or denial of jail credit will be made at a remote correctional institution based upon a record made by a correctional officer. Appendix C to the Brief of the United States illustrates a serious problem with the Government's position. The next to last paragraph provides that it will be presumed that time in detention was previously credited to a state sentence, thus placing the burden on the sentenced defendant to show otherwise. In the vast majority of cases the sentenced defendant will not have the assistance of a lawyer to find and present necessary evidence or to articulate and argue points. The defendant, with limited access to long distance telephone calls and no opportunity to personally obtain court records, etc., will be at the mercy of distant court clerks, half way house staff, and overworked probation officers for information needed to support his position. Some sentenced defendants will be

up to this task; many will not. Even those who persevered would face administrative appeals and ultimately a court challenge, probably *pro se*, before the matter was finally resolved, perhaps, as was the case with parole and good and industrial credits under the old sentencing scheme, not until the day of release.

Even the Government admits that the Bureau of Prisons will not be the final authority on the grant of jail time, since an inmate aggrieved by the administrative denial of jail time credit would have the right of judicial review. Brief of the United States pp. 24, 29. The question, then, is not whether the district court will be resolving the issue, but when. By resolving the issue at the outset, as the Circuit Court ruled, section 3585 becomes consistent with Sentencing Reform Act goals of placing sentencing authority in the sentencing court and avoiding uncertainty of release date for sentenced offenders.[4]

In most cases, the grant or denial of jail credit will make a material difference in the length of a sentence, sometimes a matter of months, or, as here, over a year. Particularly where there is a substantial amount of credit at stake, if the sentencing judge does not make the determination, what is likely to occur is the judge will surely try to anticipate and fashion a sentence that takes the grant or denial into account. If the court guesses wrong, or makes no effort to account for jail credit, then the resulting sentence will not be a comprehensive and consistent expression of the punishment tailored to fit the crime and the offender. Thus, the purposes of the Sentencing Reform Act will be served in a haphazard fashion. Giving the sentencing court the authority to determine jail credit will make it easier for the sentencing court to accurately impose the appropriate sentence for the convicted offender.

[4] The tortured logic of the Government's explanation why respondent would not get credit for jail time illustrates the likelihood that such issues will be litigated in district court sooner or later. Apparently, the Government would deny credit since respondent's "total" state sentence would not be consumed by the federal sentence, although the operations memorandum requires only that the "sentence" be consumed. The difference is apparently whether parole time is counted, or just time in custody.

The Government advocates the advantages of the informality and flexibility of allowing a prison staff member to decide jail credit by means of a phone call and reference to internal guidelines. Flexibility, apparently also means that the award or denial of credit would be subject to reversal on changed circumstances throughout the period of incarceration, but that is inconsistent with Congress' stated desire for certainty in release dates. Moreover, informality is often not desirable for the fair resolution of contested issues, particularly where that informality comes at the expense of one party's ability to affect the outcome of the decision.

Furthermore, although the prison official would bring expertise and the ability to get information over the telephone to the decision making process, so would the probation officer, who has the same flexibility in information gathering techniques, with the added advantage of familiarity with the defendant and his circumstances pretrial. The probation officer would also be familiar with local institutions of confinement, local record keeping procedures and personnel, whereas the prison official would usually have no knowledge of state and local jail practices. The probation officer, in the course of preparing the pre-sentence report already investigates the convicted offender's prior criminal history, which would include much of the information necessary to decide whether he is eligible for credit for time in custody. And to the extent that the policies and procedures developed by the Bureau of Prisons regarding jail credit are instructive in applying the mandate of section 3585, the sentencing court can give them appropriate consideration when

brought to its attention by the probation officer or by one of the parties.

In rejecting arguments for the continued role of the Parole Commission, Congress already determined that administrative decisions by a relatively large number of functionaries of questionable accuracy are less desirable for insuring relatively uniform application of sentencing principles to the determination of sentencing issues than the system of federal district courts, with review by the courts of appeal and ultimately this Court. Senate Report at 54-55. There is no reason to believe that Congress reached any different conclusion on whether the Bureau of Prisons should determine jail credit rather than the sentencing judge.

B. Determining Jail Credit at the Time of Imposition of Sentence Will Not Result in the Unintentional and Unwarranted Award of Double Credit for Time in Custody.

The only legitimate interest articulated by the Government is the prevention of "double credit" for time in custody. Absent this concern, it would appear that the Attorney General is motivated only by an effort to recover authority shifted from him to the courts by the Sentencing Reform Act, or to secure additional leverage against sentenced inmates. However, the statutory goal of avoiding the award of "double credit" is adequately served, if not better so, by having the decision made at the time of sentencing, by the sentencing court.

The Government argues that allowing the Attorney General to award jail credit would prevent what it suggests was an unwarranted award of "double credit" in situations like the one presented in this case. The fallacy of the Government's position is that it overlooks the important and proper role expressly left by Congress to the state sentencing authorities by the provisions of section 3585. In this case, for example, the state court decided

to award credit against the state sentence for pretrial time in custody, only after the district court had initially declined to award such credit against the federal sentence. The state court then decided, as it has the right, to run its sentences concurrent with the federal sentences and release the respondent to the service of his federal sentence. The state parole authority has since paroled respondent to the federal sentence.

It is inevitable, when sentences are to be imposed upon one person by separate sovereigns, that one sovereign must sentence first. Because of the dictates of the Speedy Trial Act, 18 U.S.C. §§ 3161 *et seq.*, the federal court will often be the first to sentence. This potentially gives an advantage to the state to sentence later, taking into account the conditions of the federal sentence. The state can then choose whether to order its sentence concurrent or consecutive, vary the length of the sentence within the limits of state sentencing laws and any plea agreement, and, if the defendant is in state custody, choose whether to release the defendant for the service of the federal sentence. In enacting section 3585, Congress made the policy decision to opt for finality and certainty as to the federal sentence in favor of the endless post-sentence adjustment of a sentence to account for the sentencing actions of other jurisdictions. This policy choice also acknowledges that it is legitimate for the state, if it imposes sentence second, to make decisions that can effect the total time in custody for the sentenced offender, even if that means there will be some "double counting" of time in custody.

Some situations where post-sentence events indicate the award or denial of jail credit was erroneous may be corrected through Rule 35(a)(2) and (c), F.R.Cr.P. and 18 U.S.C. § 3582(c). It may be that some such situations can not be remedied, just as on some occasions, post-sentence events, or discoveries, may demonstrate the error of the term or conditions of any criminal sentence,

yet no relief is available. Nevertheless, Congress chose to accept this risk in favor of a process that would enhance the uniformity and certainty of federal sentences and release dates for incarcerated defendants. Given the language and context of section 3585, it is clear that Congress made this choice. In the vast majority of cases, allowing the sentencing court to determine jail credit will result in a more fair and accurate determination and insure, to the extent possible, that the sentence imposed reflects the amount of time the sentenced offender will actually spend in custody, subject only to reduction for good time credits. This certainty in sentencing is consistent with the stated goals of the Sentencing Reform Act to make federal criminal sentencing "fairer and more certain." Senate Report at 65.

CONCLUSION

For the foregoing reasons, respondent urges this Court to affirm the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Inmate copy

STATE OF TENNESSEE

BOARD OF PAROLES

404 JAMES ROBERTSON PARKWAY SUITE 1300
NASHVILLE, TENNESSEE 37219 • (615) 741-1673

TO: Inmate Richard Wilson No. TDOC#134946 Fed#12358-075 Unit FCI Mariann, FL

FROM: Tammy Hall, Administrative Secretary

DATE: October 30, 1991

SUBJECT: Final Parole Hearing Disposition

The decision of the Parole Board in your case:

_____ The final disposition of your grant/revocation hearing is

_____

_____

X You have been recommended for release on parole.
To His Federal Sentence

_____ Please complete the attached release plan and return to me.

_____ Your case has been continued until _____.

_____ Your case has been declined until _____.

_____ The final disposition of your parole hearing has been delayed because you received a split vote. You will be notified immediately when a final disposition is rendered.

(If you have questions, please contact me.)

cc: File
Case Manager
ICC File

APPENDIX A

STATE OF TENNESSEE

BOARD OF PAROLES

Certificate of Parole

No. 49932

Having been certified eligible for parole by the Department of Correction and duly considered by the Board of Paroles: parole is granted to the prisoner named hereon under the conditions cited below. Said parole shall expire upon the sentence expiration date and a Certificate of Discharge shall be issued, provided the Board is satisfied that the parolee has kept the conditions of parole in a satisfactory manner.

1. I will go directly to my destination, and upon arrival, report immediately to my Parole Officer, under whose supervision I am paroled, unless otherwise, directed.
2. I will obey the law of the United States, or any State in which I may be, as well as any municipal ordinance.
3. I will report all arrests, including traffic violations, immediately, regardless of the outcome, to my Parole Officer.
4. I will not own, possess, or carry any type of deadly weapon (guns, rifles, knives or any illegal weapons). I further understand that under provision of Federal and State law, I am subject to prosecution if I violate this condition.
5. I will work steadily at a lawful occupation, and support my dependents (parents, spouse, children, and others), to the best of my ability. If I become unemployed, I will immediately report this to my Parole Officer and then begin to look for another job.
6. I will get the permission of my Parole Officer before changing my residence or employment, or before leaving the County of my residence or the State.
7. I will allow my Parole Officer to visit my home, employment site, or elsewhere, and will carry out all instructions he/she gives, and report to my Parole Officer as given instruction to report. I will submit to electronic monitoring if required.
8. I will not use intoxicants (beer, whiskey, wine, etc.) of any kind to excess, or use or have in my possession narcotic drugs or marijuana. I will submit to drug testing if required.
9. I agree to pay all required fees to the supervision and Criminal Injuries Fund.

NAME: Richard Wilson PRISON NUMBER: 134946

Having been convicted as follows:

DOCKET NUMBER	# OF COUNTS	COUNTY	OFFENSE	MAXIMUM SENTENCE
88549F	1	Putnam	Fraud Insurance Claim	2 years
88550F	1		Burg 1	5 years
88551F	1		Aid & Abett Armed Robbery	10 years

Parole Office Location Code: PD

Parole Officer: Chattanooga Parole Office, 540 McCallie Ave., Suite 400
Chattanooga, TN 37402 (615) 634-6333

It is hereby ordered that said prisoner be and is hereby granted Federal Parole/Early Release from TDOC, effective and that the parolee immediately, upon release from custody report to his/her parole officer at the address noted above.
Parolee is also subject to the following SPECIAL CONDITIONS:

Rec. Parole with expiration date of 6-19-2003 to sentence currently serving (Arkansas) and or approved program. Report to the Chattanooga Parole Office immediately upon release.

The parolee may present his/her views about special conditions in writing to the Board through their Parole Officer.

I have read, or have had read to me this Order of Parole. I fully understand the conditions of parole, and I agree to comply with such conditions during the period of my parole. Further, I hereby waive all extradition rights and process, and agree to return to Tennessee voluntarily if at any time prior to my release from parole the Tennessee Board of Paroles directs me to do so.

Prison Official or Parole Officer	Date	X Signature of Parolee	Date

Jurisdiction: Federal Score: 2a.

DISTRIBUTION: Original-Central Office, 1st copy-Parole Officer, 2nd copy-Parolee and 3rd copy-Prison/Jail

BP 0015 (Rev. 1-90)

2a

State of Tennessee
BOARD OF PAROLES
[illegible] Parkway, Tennessee, Suite 1200
404 James Robertson Parkway
Nashville, TN 37243-0850
(615) 741-1150
[illegible]

INMATE # 134946 INMATE NAME Richard Wilson DATE OF HEARING 10-25-91

HEARING LOCATION P R INSTITUTION FCI Marianna, FL Tape# _____ Side _____

FOR OFFICIAL USE ONLY: P A P R B Y Z

TYPE OF HEARING: I
M—Mapp, P—Pardon, D—Appellate, B—Custodial, T—Mandatory, N—Not Heard, I—Initial Grant, X—Administrative, E—Executive Clemency, U—Previously Continued, Y—Previously Declined, Z—Previously Rescinded

WHO HEARD CASE: B
H—Hearing Officer, B—Board Member(s), Q—Quorum of Board, F—Full Board, Y—Delete, reschedule

RECOMMEND—To Detainer and/or Approved Program
Inmate meets minimum criteria for release.

7. Commutation _____
5. Custodial-Begin Sentence _____
3. Early Release Date
4. Effective _____
0. MAPP Contract, Effective _____
9. Other, specify in COMMENTS*
8. Pardon
1. Probationary Parole
R. Recommend, Past Release Date(s)
6. Regular Parole
2. Release Eligibility Date (RED)

CONTINUE—Until

A. Administrative Docket
D. Disposition of Court Hearing
F. Offense Report(s)
H. Schedule for Appearance Hearing
M. Additional Information Needed
N. Notify _____
Z. Other, specify in COMMENTS
P. Psychological Evaluation
R. Refer to DOC, specify who/why in COMMENTS

DECLINE—Review

J. Early Release
D. _____ PP _____ RP _____ RED _____ PAST
E. Balance of Sentence, Review at Expiration
W. Executive Clemency: _____ Pardon _____ Commutation _____ Respite

SPECIAL CONDITION(S)—for release on Parole

R. Medical Job Waiver
3. Evaluation for Mental Health Treatment
V. No Driving
N. No Special Conditions
9. Other, specify in COMMENTS*
P. Permanent Job Waiver
S. Sex Offender Treatment
2. Evaluation for Substance Abuse Treatment
T. Temporary Job Waiver
L. Living Condition _____
7. Restitution _____

REASON FOR DECLINE
C. Adversely Affect Discipline
A. Participate in Alcohol Program
D. Participate in Drug Program
E. Participate in Education Program
P. Participate in Mental Health Program
S. Complete Sex Offender Program
V. Complete Vocational Program
W. Disciplinary Report(s)
R. High Risk
Z. Other, Specify—COMMENTS*
I. Inadequate Release Plans
B. Seriousness of Offense

*COMMENTS: 9 2

REMARKS: _____

Hearing Official(s) _____

DATE	INITIALS	ADP.	MOD.	REJ.
10-25-91	[illegible]	☐	☐	☐
10/29/91	[illegible]	☐	☐	☐
10-29-91	[illegible]	☐	☐	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐
		☐	☐	☐

3 - (9- to federal sentence)
(3) (9- to federal sentence)
(3) (9 to federal sentence)

PREDICTION SCALE SCORE _____

Original—BOP file Canary—Institutional file Pink—Inmate

BP-0061
Rev. 11/90

3a